Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Anor

HIGH COURT (KUCHING) — COMPANIES WINDING-UP NO 28–32 OF 2006–II
HAMID SULTAN JC
26 JULY 2007

Companies and Corporations — Winding up — Just and equitable grounds — Company was an investment company — Whether quasi-partnership — Whether there was a breakdown in relationship of mutual trust and confidence

The petitioner applied to wind up the company under s 218 of the Companies Act 1965 ('CA 1965'). The petitioner and the first respondent were founders as well as the only shareholders of the second respondent from the time of its incorporation in 1996. The petitioner and the first respondent had set up a number of joint venture businesses ('Sanyan group') together and the petitioner alleged that the joint venture business were quasi-partnership business in nature and based on mutual trust, confidence and there was reciprocal duties to act with utmost good faith to each other. This was strongly denied by the first respondent. The petitioner alleged that until 2003, the first respondent was not involved in active management of the company and the other companies. The second respondent was an investment company and had one main asset, being its ownership of 98.5% the shares in Pelita Towerview Sdn. Bhd. The second respondent had no other trading activities except for the provision of 'management services' to Sanyan Wood Industries Sdn Bhd ('Sanyan Wood'). The petitioner alleged that the first respondent began to take control of the Sanyan group and ignored the petitioner's instructions. After early 2003, the first respondent refused to meet with the petitioner and started to take over the operations and control of the companies within the Sanyan group. The petitioner alleged that the business relationship with the joint venture partners had continued to deteriorate from 2004 to 2006, as evidence by acrimonious correspondence, in respect of the various groups of companies in the Sanyan group and alleged that the breakdown of the relationship affected all their joint venture companies. The petitioner alleged that there was a breakdown of mutual trust and confidence between the petitioner and the first respondent, the only two shareholders in the joint venture company. The first respondent in opposing the petition alleged that the petitioner voluntarily resigned his position as a managing director since he was elected as state assemblyman and wanted to concentrate on politics. The first respondent stated that the companies under Sanyan group were separate, legal autonomous entities comprised of individual and distinct board of directors who had the day-to-day conduct of the business of each respective company. Each of the said company was involved in businesses and activities distinct from each other and was comprised of shareholders different and distinct from each other and there had never been any intention, understanding or agreement between any of the shareholders or directors of any of the companies that any of them were to be operated as a joint

venture, as a partnership or as a quasi-partnership. Instead of the possibility of a share buy-out, the petitioner had decided to take the excessive step of petitioning to wind up the second respondent.

Held:

(1) The intitulement and the prayer in the petition did not disclose under what sub-section of s 218 of CA 1965 the petition was grounded on. This by itself could be fatal. The court in condoning the irregularity decided the petition on the basis that the petitioner was relying on s 218(1)(i) of CA 1965 which deals with just and equitable ground to wind up the company (see paras 2–3).

(2) The petitioner was only a foreman in the company where the first respondent was at that material time a director. The first respondent must have had respect for the petitioner's business ability but did not have intention at all to make him an equal partner. This could be seen in the different equity structure of the petitioner and the first respondent in the Sanyan Group. It was clear from the conduct of parties that the first respondent always wanted to have control over the company. If at all the petitioner was made a managing director, it must be the case that the first respondent must have had great respect in the petitioner's ability to manage the company. This did not necessarily mean that it must be equated to mutual trust and or confidence. Till date the first respondent had not removed the petitioner as the director or chairman, notwithstanding the fact that there appeared to be evidence of misunderstanding from the time the first respondent's daughter started participating in the business activities (see para 16(a)).

(3) The Sanyan Group did not come within the definition of domestic company as all the companies the second respondent was associated with had different shareholders with different equities and consisting of foreign shareholders. The presence of the petitioner or the first respondent as director or chairman could not be said to be the sine qua non for the second respondent to operate though it may be the criteria for its profitability. In this case, there was no allegation the second respondent was not running profitably. The petitioner and the first respondent could still afford not to participate in the management of the company and still be shareholders and contribute to obtain good contracts or concessions and still receive dividends. The court could not see why the company should be wound up on the facts of this case where the petitioner had not been deprived of his directorship and the company was still operating profitably (see para 16(b)).

(4) The court found that the petitioner had voluntarily resigned as the managing director as evidence by documentary evidence. There was no specific evidence to hold that there was a quasi partnership. It was purely a business venture on which both parties must have relied on their respective goodwill to garner profits rather than mutual trust and confidence in the literal sense, related to partnership. Those who entered into partnership did not mean that they did so because of mutual trust and confidence among each partner. All prudent partnerships were entered into after taking into consideration the calculated risk and not because of mutual trust and confidence. Once a partnership came

into effect, the law requires some category of honesty and fiduciary responsibility to be maintained for the common good of the business and this could not be equated to mutual trust and confidence (see para 16(c)).

[Bahasa Malaysia summary

Pempetisyen memohon untuk menggulungkan syarikat di bawah s 218 Akta Syarikat 1965 ('AS 1965'). Pempetisyen dan responden pertama adalah pengasas dan juga pemegang-pemegang saham tunggal di responden kedua daripada tarikh penubuhannya di 1996. Pempetisyen dan responden pertama bersama-sama telah menubuhkan beberapa perniagaan-perniagaan usahasama ('kumpulan Sanyan') dan pempetisyen menyatakan bahawa perniagaan-perniagaan usahasama tersebut adalah bersifat perniagaan perkongsian quasi dan berdasarkan perhubungan saling percaya, yakin dan terdapat kewajipan-kewajipan bersaling untuk bertindak dengan mengamalkan niat mulia antara satu sama lain. Ini dinafikan dengan tegas oleh responden pertama. Pempetisyen menyatakan bahawa sehingga 2003, responden pertama tidak melibatkan diri dengan aktif dalam pengurusan syarikat dan syarikat-syarikat lain. Responden kedua adalah syarikat pelaburan dan mempunyai satu aset, iaitu pemilikan 98.5% saham-saham di Pelita Towerview Sdn Bhd. Responden kedua tiada apa-apa aktiviti-aktiviti perdagangan kecuali memberi 'perkhidmatan pengurusan' kepada Sanyan Wood Industries Sdn Bhd ('Sanyan Wood'). Pempetisyen menyatakan bahawa responden pertama mula mengambil alih kumpulan Sanyan dan tidak mengendahkan arahan-arahan pempetisyen. Selepas permulaan 2003, responden pertama enggan menemui pempetisyen dan mula mengambil alih operasi-operasi dan pengawalan syarikat-syarikat dalam kumpulan Sanyan tersebut. Pempetisyen menyatakan bahawa perhubungan perniagaan dengan rakan kongsi usaha sama telah terus merosot dari 2004 sehingga 2006, yang dibuktikan dengan kesengitan surat menyurat, berhubung dengan kumpulan-kumpulan syarikat di kumpulan Sanyan dan mengatakan bahawa kemerosotan perhubungan menjejaskan keseluruhan syarikat-syarikat usaha sama tersebut. Pempetisyen menyatakan bahawa terdapat kemerosotan saling percaya dan yakin di antara pempetisyen dan responden pertama, yang merupakan hanya dua pemegang-pemegang saham di syarikat usaha sama tersebut. Responden pertama dalam menentang petisyen menyatakan bahawa pempetisyen sukarela meletak jawatannya sebagai pengarah urusan semenjak beliau dilantik sebagai ahli dewan undangan negeri dan ingin menumpu perhatian kepada politik. Responden pertama menyatakan bahawa syarikat-syarikat di bawah kumpulan Sanyan adalah berlainan, dengan entiti autonomi undang-undang yang melibatkan individu dan lembaga pengarah yang berlainan yang mempunyai perlaksanaan perniagaan yang berlainan antara satu sama lain dan melibatkan pemegang-pemegang saham yang berlainan antara satu sama lain dan tiada pernah terdapat sebarang niat, persefahaman ataupun perjanjian di antara mana-mana pemegang-pemegang saham ataupun pengarah-pengarah mana-mana syarikat bahawa ia akan dijalankan sebagai satu usaha sama, sebagai perkongsian ataupun kuasi-perkongsian. Selain daripada kemungkinan jualan penyerahan saham, pempetisyen telah memutuskan untuk mengambil langkah-langkah drastik dengan membuat petisyen untuk menggulungkan responden kedua.

Diputuskan:

(1) Tajuk dan permohonan di petisyen tersebut tidak mendedahkan di bawah sub-seksyen yang mana di s 218 AS 1965 petisyen didasarkan. Ini dengan sendirinya adalah memudaratkan. Mahkamah dalam membiarkan luar aturan tersebut memutuskan petisyen tersebut adalah berdasarkan kepada pempetisyen bergantung kepada s 218(1)(i) AS 1965 yang menyentuh kepada alasan adil dan saksama untuk menggulungkan syarikat (lihat perenggan 2–3).

(2) Pempetisyen adalah hanya seorang mandur di syarikat tersebut di mana responden pertama pada ketika itu adalah pengarah. Responden pertama semestinya telah menghormati kemampuan perdagangan pempetisyen tetapi tidak berhasrat untuk menjadikannya rakan kongsi yang sama. Ini dapat dilihat daripada perbezaan struktur ekuiti pempetisyen dan responden pertama di kumpulan Sanyan. Ia adalah jelas daripada perbuatan parti-parti, responden pertama memang hendak pengawalan atas syarikat tersebut. Sekiranya pempetisyen dijadikan pengarah urusan, ia adalah kerana responden pertama menghormati kebolehan pempetisyen untuk mengurus syarikat tersebut. Ini tidak bermaksud bahawa ia adalah sama dengan saling percaya dan yakin. Sehingga kini responden pertama telah tidak menyingkirkan pempetisyen sebagai pengarah atau pengerusi, walaupun terdapat bukti salah faham dari masa anak responden pertama mula melibatkan diri dalam aktiviti-aktiviti perniagaan tersebut (lihat perenggan 16(a)).

(3) Kumpulan Sanyan tidak termasuk di dalam definisi syarikat domestik oleh kerana kesemua syarikat-syarikat responden kedua berkaitan dengan mempunyai pemegang-pemegang saham yang berlainan dengan ekuiti-ekuiti yang berlainan dan melibatkan pemegang-pemegang saham asing. Kehadiran pempetisyen atau responden pertama sebagai pengarah atau pengerusi tidak boleh dikatakan sine qua non untuk responden kedua beroperasi walaupun ia mungkin kriteria untuk pencapaian keuntungan. Dalam kes ini, tiada pengataan bahawa responden kedua tidak mendatangkan keuntungan. Pempetisyen dan responden pertama masih dapat untuk tidak melibatkan dengan pengurusan syarikat tersebut dan masih menjadi pemegang-pemegang saham dan menyumbang untuk memperolehi kontrak-kontrak atau konsesi-konsesi dan masih menerima dividen-dividen. Mahkamah tidak dapat lihat mengapa syarikat tersebut patut digulungkan atas fakta kes ini di mana pempetisyen tidak dihalang daripada jawatan pengarah dan syarikat tersebut mendatangkan keuntungan (lihat perenggan 16(b)).

(4) Mahkamah berpendapat bahawa pempetisyen telah secara sukarela meletak jawatan sebagai pengarah urusan seperti yang dibuktikan melalui bukti dokumentar. Tiada bukti spesifik untuk memutuskan ia sebagai kuasi perkongsian. Ia hanya semata-mata perniagaan usahasama di mana kedua-dua parti semestinya bergantung atas nama baik mereka masing-masing untuk mendapatkan keuntungan dan bukannya atas saling percaya dan yakin di antara rakan kongsi. Segala perkongsian yang bijak dimasuki selepas mempertimbangkan risiko yang terkira dan bukannya disebabkan saling percaya dan yakin. Selepas satu perkongsian dibentuk, undang-undang memerlukan beberapa kewajipan fidusiari dan kejujuran untuk dikekalkan

demi kebaikan perniagaan tersebut dan ini tidak dapat dipersamakan dengan saling percaya dan yakin (lihat perenggan 16(c)).]

Notes

For cases on just and equitable grounds, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1166–1171.

Cases referred to

A Company, Re [1983] 2 All ER 854; [1983] BCLC 151 (refd)
A Company, Re (No 0370 of 1987) [1988] 1 WLR 1068 (refd)
Abnash Kaur v Lord Krishna Sugar Mills Ltd [1974] 44 Com Cases 390 (Del) (refd)
Anglo-Continental Produce Co Ltd Re [1939] 1 All ER 99 (refd)
Atul Drug House Ltd, In re [1971] 41 Com Cases 352; [1970] 2 Comp LJ 274 (Guj) (refd)
Bhalachandra Dharmajee Makaji v Alcock, Ashdown & Co Ltd [1972] 42 Com Cases 190 (Bom) (refd)
Chappel House Colliery & Co [1883] 24 ChD 259 (refd)
Cheow Chew Khoon (t/a Cathy Hotel) v Abdul Johari b Abdul Rahman [1995] 1 MLJ 457 (refd)
Cooper (Cuthbert) & Sons Ltd Re [1937] 2 All ER 466 (refd)
Cox v Hickman [1860] 8 HLC 268 (refd)
Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd [1997] 2 MLJ 756 (refd)
Cuthbert Cooper & Sons Ltd Re [1937] Ch 392 (refd)
Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360 (refd)
Fildes Bros Ltd Re [1970] 1 All ER 923 (refd)
Hind Overseas (P) Ltd v Raghunat Prasad Jhunjhunwalla AIR 1976 SC 565 (refd)
Lim Mong Sam @ Lim Ah Tee v Yai Yen Hon @ Chua Yen Yong & Ors [1995] 4 MSCL 91 (refd)
Loch v John Blackwood Ltd [1924] All ER 200 (refd)
Nageswara Rao v Rajahmundry Electric Supply Corporation Ltd 1957 Andh LT 728 (refd)
Ng Eng Hiam v Ng Kee Wei & Ors [1965] 31 MLJ 238 (refd)
Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd [1991] 1 MLJ 338 (refd)
Ripon Press & Sugar Mill Co Ltd v V Gopal Chetty AIR 1932 PC 1 (refd)
State Bank of India v Hedge and Golay Ltd [1867] 62 Com Cases 239 (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (refd)
Tien Ik Enterprise Sdn Bhd & Ors v Woodsville Sdn Bhd [1995] 1 MLJ 769 (refd)
Veeramachineni Seethiah v Bode Venkatasubbiah & Ors AIR 1949 Madras 675 (refd)
Virendra Singh Bhandari v Nandlal Bhandari & Sons Ltd [1982] 52 Com Cases 36 (refd)
Walter L Jacob & Co Ltd, Re [1989] BCLC 345 (refd)
Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors and other applications [1994] 3 MLJ 89 (refd)
Yenidje Tobacco Co Ltd, In re [1916] 2 Ch 426 (refd)

Legislation referred to

Companies Act 1965 ss 181, 218, 221(2), 355, 372
Companies (Winding Up) Rules 1972 r 30(1)

A Courts of Judicature Act 1964 ss 16, 25(2)
Partnership Act 1961 s 37(f)

George Lo (James Lo & Ting Cheng Ching with him) (George Lo & Partners) for the petitioner.
Sim Hui Chuang (Lim Lip Sze with him) (Reddi & Co) & Willian Yeo (JM Lim & Co) B *for the respondents.*

Hamid Sultan JC:

C **[1]** This is my judgment in respect of the petitioner's application to wind up the company under s 218 of the Companies Act 1965 ('CA 1965').

[2] The intitulement and the prayer in the petition do not disclose under what sub-section of s 218 of CA 1965 the petition is grounded on. This by itself can be fatal. In the case of *Cheow Chew Khoon (t/a Cathy Hotel) v Abdul Johari b Abdul* D *Rahman* [1995] 1 MLJ 457, Justice Gopal Sri Ram JCA observed:

> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule E of court under which the court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

[3] On the facts of the case and the wider interest of justice, I am condoning the irregularity and deciding the petition on the basis that the petitioner is relying on F s 218(1)(i) of CA 1965 which deals with just and equitable ground to wind up the company.

[4] On 7 May 2007 when the petition was called for hearing, the petitioner objected to the last affidavit of the respondent on the grounds that the affidavit was G filed out of time. The petitioner relied on the Court of Appeal decision of*Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 to expunge the said affidavit. I heard the submission of the parties and expunged the said affidavit and said that I will state my reasons after hearing the petition. They are are as follows:

H (a) In *Bank of Commerce (M) Berhad v Far East United Industries Sdn Bhd* [2000] MLJU 431, the provision of r 30(1) of the Companies (Winding Up) Rules 1972 was considered. KN Segara J (as he then was) following the Court of Appeal decision in Crocuses held that r 30(1) of the Companies (Winding Up) Rules 1972 specifically provides that affidavit-in-opposition to a winding-up I petition must be filed and a copy thereof served on the petitioner or his solicitors at least seven days before the appointed date of hearing of the petition. Further, the court stated that the said rule is mandatory in nature and should be strictly complied with.

(b) It must be asserted that the winding up rules were made pursuant to s 372 of the CA 1965 and s 16 of the Courts of Judicature Act 1964 ('CJA 1964'). A point to be noted is that the High Court has unfettered powers pursuant to s 25(2) of the CJA 1964 as set of out in the schedule under the title 'Additional Powers of High Court'. Under cl 8 of the 'Additional Powers of the High Court' it is stated that power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, lies with the court. Therefore, any application must not be made until after the expiration of the time prescribed, provided that this provision shall be without prejudice to any written law relating to limitation. That being the case, to say r 30 of the winding up rules is mandatory will be in breach of cl 8 of the additional powers of the High Court to be read with s 355 CA 1965 and rule 193 winding up rules. The observation of the Court of Appeal in Crocuses case in respect of r 30 of winding up rules will appear to be per incuriam. It would have been appropriate if the Court of Appeal had considered the decision of the Privy Council in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 where the provision of the winding up rules was considered and the court specifically stated:

> In winding up proceeding the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that the application has been granted and the deponent does not attend.

(c) Though Crocuses case appears to be per incuriam, I take the view that in not allowing the further affidavit in reply the respondents will not prejudice the respondents' case for the burden of proof is upon the petitioner and not the respondents to make out a case for winding up. The petitioner is not entitled in law to broaden his case more than what was stated in his petition and the respondent's affidavit in opposition should sufficiently rebut the petitioner's allegation in the petition. Support for this proposition can be garnered from a number of cases. (i) In *Re Fildes Bros Ltd* [1970] 1 All ER 923, Meggary J opined:

> In cases in which there are no normal pleadings, it seems to be important that those who oppose a winding-up should know, in time to prepare their case, what are the allegations that they have to meet. If after a petition has been presented the petitioner wishes to broaden his attack, let him first amend his petition.

(ii) The principles adumbrated in the case of *Re Fildes Bros Ltd* was followed in*Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd* [1991] 1 MLJ 338 where Chao Hick Tin JC disallowed a petitioner from straying outside his petition and opined:

> Other than a bare statement in para 8 of the petition which reads 'alternatively the company is insolvent and unable to pay its debts' there is no other statement or allegation in the petition setting out facts to show that the company is generally insolvent. The affidavit filed by the petitioners at the eleventh hour was an attempt to introduce evidence on the company's general insolvency even though nothing on that is stated in the petition itself. I agree with the submission of the counsel for the company that it would be grossly unfair to permit the introduction of such facts by

affidavit at that late stage. The company had hardly an adequate opportunity to rebut. … Accordingly, I ruled that for the purposes of the hearing, I would disregard that affidavit which was filed to persuade the court to wind up the company on the ground that it is generally insolvent.

[5] The hearing of the petition commenced by the petitioner giving evidence. I realised during the course of hearing the petition that the respondents were attempting to restate what was in the affidavit. I informed them that s 218(1)(i) petition is meant to be petition to be tried by affidavits. Only in exceptional cases that too with the permission of court, can the deponent be cross-examined. I have informed the parties that I will give my grounds in my judgment after hearing why oral evidence in principle should not be allowed in hearing a s 218 petition. My reasons are as follows:

(a) In *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 Lord Temple Man sitting on the Privy Council observed:

> The Company's (Winding UP) Rules 1972 provide for winding up petition to be verified by affidavit and for affidavits in opposition and reply to be sworn and filed. This procedure was followed in the present case. In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding up proceeding the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend. The court cannot give a direction about evidence unless one of the litigants desires such direction to be made. Of course a judge may indicate to a petitioner that unless he calls oral evidence or applies to cross-examine the deponents of the opposition so as to prove a disputed fact, his petition is likely to fail. The judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross-examine the petitioner's deponents for the purpose of disproving an allegation made by the petitioner is likely to succeed. At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts. On behalf of the respondent in the present case it was submitted that the trial judge paid some attention to the petitioner's disputed allegations of an express assurance but the board is satisfied that the judge confined his consideration of the petition to the undisputed facts and rightly concluded that the petitioner had made out his case that it was just and equitable to wind up the company.

(b) *Tahansan*'s case is not authority for the proposition that oral evidence must be given for purpose of hearing the petition. In fact the law which governs the mode of trial in a winding up petition is set out in s 221(2) of CA 1965 which states as follows:

> (2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition.
>
> (a) direct that any notices be given or any steps taken before or after the hearing of the petition;

(b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the court;

(c) direct that oral evidence be taken on the petition or any matter relating thereto;

(d) direct a speedy hearing or trial of the petition or any issue or matter;

(e) allow the petition to be amended or withdrawn; and

(f) give such directions as to the proceedings as the court thinks fit.

(c) Any party who intends to adduce oral evidence at the trial of the hearing must make an application under s 221 of CA 1965 and the court must direct to do so. Thus, it is not a substantive right to adduce oral evidence.

(d) There is no inflexible rule or practice prohibiting the adducing of oral evidence or the cross-examination of the deponents of affidavits in winding up applications. Where necessity suggests or expediency requires, it is open to the Judge trying winding up proceedings, to allow oral evidence. Where the application for calling oral evidence is not only belated but is intended to retard and delay the progress of the winding up application the court must refuse to exercise the discretion to allow oral evidence, as in winding up petition, expedition is absolutely necessary (see *Veeramachineni Seethiah v Bode Venkatasubbiah & Ors* AIR (36) 1949 Madras 675).

(e) In *Chappel House Colliery & Co* [1883] 24 ChD 259, it was stated that the court will not as a rule order a petition to stand over for a long period as it would not be just to the company. To expedite the hearing of winding up proceedings is not only in the interest of the company but also an element of public policy in regard to commercial morality to dispose of the petition early (see *Veeramachineni*'s case).

[6] The petitioner in the petition inter alia says: (i) the petitioner and the first respondent are founders as well as the only shareholders of the second respondent from the time of its incorporation in 1996. The petitioner is holding 44% of the shares and the respondents the balance of 56%. The petitioner had come to know the first respondent and his brother, the late Datuk Mohammad Arip (deceased) as early as 1970 when working in Ding Brothers Sdn Bhd. The petitioner and the first respondent had set up a number of joint venture businesses together and the deceased was also involved in the joint venture business. (ii) the petitioner alleges that the joint venture business were quasi-partnership business in nature and based on mutual trust, confidence and there is reciprocal duties to act with utmost good faith to each other. [*This is an issue which is seriously denied by the first respondent, and a focal point of challenge*]. The joint venture business of the petitioner and the respondent in the last 25 years includes a number of companies namely (i) Binta Corporation Sdn Bhd (ii) Marine Utama Sdn Bhd (iii) Sanyan Sdn Bhd (iv) Sanyan Lumber Sdn Bhd (v) Pembangunan Hasil Baik Sdn Bhd (vi) Mansang Holdings Sdn Bhd (vii) Sanyan Development Sdn Bhd (viii) Sanyan Sawmill Sdn Bhd (ix) Sarachi Services Sdn Bhd (x) Goodmatch Sdn Bhd (xi) Sanyan Wood Industries Sdn Bhd (xii) Sanyan Holdings Sdn Bhd (xiii) Sanyan-Soon Hup Sdn Bhd. The joint venture companies consist of other shareholders and directors holding different equities, and the companies are commonly referred to as 'the Sanyan Group of Companies'. (iii) the petitioner alleges that the petitioner was the one who was responsible for initiating

A the investment and took charge of the business operation. Until 2003, the first respondent was not involved in active management of the company and the other companies. [Here the petitioner does not disclose why the first respondent became involved. The first respondent says that the petitioner voluntarily resigned his position as a managing director since he was elected as State Assemblyman and wanted to concentrate on politics]; (iv) the second respondent was an investment company and has one main asset, being its ownership of 98.5% the shares in Pelita Towerview Sdn Bhd (Pelita). Pelita itself is an investment holding company which owns the majority of the units in the 27-storey commercial and office complex in Sibu known as Wisma Sanyan. The second respondent has no other trading activities except for the provision of 'management services' to Sanyan Wood Industries Sdn Bhd (Sanyan Wood). The second respondent's income is derived mainly from income of Sanyan Wood which is utilised to pay inter alia the directors' fees of the petitioner and first respondent. That director's fees was stopped in August 2003. From the date of incorporation the petitioner and the first respondent had only been the two signatories of the second respondent in Hong Kong & Shanghai Bank. In 1998, by consent, the first respondent's brother Dato Haji Ibrahim bin Mahmud was appointed as director and in 2003 the first respondent's daughter, Anita Hamidah Tufail was appointed director. (v) the petitioner alleges that with this appointment, the first respondent was able to seize control of the second respondent and passed a circular resolution without his knowledge to make the first respondent a compulsory signatory of the second respondent's account in Standard Chartered Bank. Thereafter in the year 2004, the first respondent caused the second respondent to cease utilising the HSBC account where the petitioner is a compulsory signatory and diverted all its banking activities to Standard Chartered Bank.

[7] Under the head of irretrievable breakdown of relationship, the petitioner says: (i) the petitioner attended the graduation of Anita in San Francisco and consented to her becoming a director in Sanyan Group because the first respondent had suggested that Anita had many new ideas for Sanyan Group. Once Anita joined the Group, the relationship between the petitioner and the first respondent deteriorated in the later part of 2002 because Anita made lot of complaints about the management of the Group and thereafter the first respondent began to take control of the Group and ignored the petitioner's instructions. After early 2003, the first respondent refused to meet with the petitioner and started to take over the operations and control of the companies within the Group. From early 2003, about eight long-time senior management staffs of Sanyan Group, who were perceived to be appointees of the petitioner, were dismissed or pressured into resigning; (ii) further, the petitioner alleges that the first respondent humiliated the staff by placing full page advertisements in both English and Chinese newspapers with the English newspapers advertisements deliberately framed to look like obituary notice. In addition, a civil engineer who is related to the petitioner was transferred to the cleaning department to supervise the cleaning of public toilets in Wisma Sanyan; (iii) the petitioner alleges that this was done to humiliate the petitioner and his relatives in the eyes of the staff in the Sanyan Group; (iv) further, the petitioner complains that that the first respondent took action to exclude the petitioner from participating in Sanyan Wood and an originating petition under section 181 has been filed in this Court to address the grievance; (v) the petitioner alleges that despite him being a director, he has been denied access to management accounts and accounting records of the second

respondent, Sanyan Wood and Pelita, and has filed originating summons in Sibu High Court in relation Sanyan Wood to address his grievance; (vi) the petitioner alleges the first respondent has deprived the petitioner the designated personal parking space in the front entrance of Wisma Sanyan, and also has deprived the assistance of personal secretary and driver. Further, in the pretext of a new security measure, the first respondent had deprived the petitioner's family members and personal secretary from entering levels 26 and 27 of Wisma Sanyan, and in addition, the security guards had been made to spy on the petitioner's movement; (vii) the petitioner alleges that the business relationship with the joint venture partners had continued to deteriorate from 2004 to 2006, as evidence by acrimonious correspondence, in respect of the various groups of companies in the Sanyan Group and alleges that the breakdown of the relationship affected all their joint venture companies; (viii) the petitioner alleges that the first respondent and the petitioner had stopped talking from 2003 and on the few occasions they had met, the first respondent had been rude and abusive to the petitioner and publicly humiliated the petitioner in front of all the staff; (ix) the first respondent has made the second respondent to stop paying the petitioner the director's fees of RM15,000 per month after August 2003; (x) the first respondent had also attempted to dilute the shareholding of the petitioner by calling an extraordinary general meeting to consider a resolution to increase the paid up capital of the company from RM5m to RM16m. This was done knowing full well that the petitioner would not have the means to subscribe for his allotment. The petitioner declined to attend the extraordinary general meeting and in consequence the first respondent could not use his majority control to force through the resolution; (xi) the petitioner alleges that the first respondent also attempted to physically exclude the petitioner from Wisma Sanyan by attempting to evict the petitioner from his personal office but it was stopped by grant of interim injunction. Further, the first respondent also attempted to stop the petitioner from the management of Sanyan Sawmill which is being litigated in Sibu High Court.

[8] With regard to breakdown of mutual trust and confidence, the petitioner says: (i) there is a breakdown of mutual trust and confidence between the petitioner and the first respondent, the only two shareholders in the joint venture company; (ii) the personal relationship which existed between the petitioner and the first respondent on which the various joint ventures were built has been irreparably destroyed; (iii) the first respondent and the petitioner have not been on talking terms with each other since 2005; (iv) there has been a lack of probity on the part of the first respondent in managing the second respondent and paying himself director's fees whilst excluding the petitioner from such payment. The first respondent has abused his control of the second respondent, by making the company pay for his personal purchases like RM2,800 worth of ikan empurau and tiger prawns purportedly bought for 'entertainment'; (v) the use of a 'casting vote' by the first respondent to break a management deadlock and get his own way amounts to unjust and inequitable conduct; (vi) The continuation of the joint venture between the petitioner and the first respondent would bring on a marathon of litigation and would have both parties running back and forth to lawyers to take advice at every turn of events; (vii) the petitioner's legitimate expectation to participate in the management of the second respondent has been breached by the first respondent's acts; (viii) having regard to the irretrievable breakdown in relationship between the

two joint venture partners and the loss of mutual trust and confidence between them, the petitioner says that it is just and equitable that the second respondent company be wound up.

[9] The first respondent in opposing the petition says:

(i) There has never been any intention, understanding or agreement between himself and the petitioner to be partners or to form and/or enter into any businesses or joint ventures in the form or nature of any quasi-partnerships or on the basis as alleged by the petitioner. The present petition is an abuse of process. The present petition is also used by the petitioner for collateral purposes including taking back management control although he is minority shareholder and had voluntarily resigned to devote more time to politics. He is also seeking to exclude or prevent the first respondent as majority shareholder in the second respondent from exercising his rights as a majority shareholder and to manage the second respondent. The petitioner's conduct and action as a director and shareholder of the second respondent, after he resigned as managing director, has been unreasonable, disruptive and contrary to the interest of the second respondent and its operation. The petitioner's action in the present petition is harmful and contrary to the best interest of the second respondent and intended to put pressure on the first respondent and the second respondent for the petitioner's collateral purposes.

(ii) From the inception of Pelita, there has never been any intention on the part of any party that Pelita would be operated as anything other than private company limited by shares. Pelita has been operated pursuant to and in accordance with the CA 1965 and general corporate principles. The management, directorship and shareholding of Pelita have been conducted and held in accordance with its articles of association as amended from time to time.

(iii) Until mid 2003, the petitioner was the managing director of the second respondent, and permitted the petitioner despite the fact the first respondent was the majority shareholder. The petitioner freely and voluntarily resigned his position as managing director to devote more time to politics. He was then the State Assemblyman for Meradong. Thereafter, the first respondent was appointed the managing director. The petitioner signed a director's circular resolution giving effect to such resignation and appointment. The petitioner remained as a director. In addition, he was appointed as chairman. There has never been any resolution or proposal to remove the petitioner as a director or chairman. The resolutions read as follows:

> SANYAN HOLDINGS SDN BHD (413109 V)
>
> Director's Resolution in Writing Pursuant to the art 90 of the Company's Articles of Association —
>
> We, the undersigned, being majority of the Directors of the Company at this day do pursuant to art 90 of the Company's Articles of Association, pass the following resolution:
>
> DCR: RESIGNATION OF MANAGING DIRECTOR

RESOLVED to accept the resignation of DATO' TING CHECK SII Managing Director of the Company with immediate effect and that the Board records appreciation of his services and contributions to the Company.

DCR: APPOINTMENT OF MANAGING DIRECTOR

And that to appoint DATO' HAJI MOHAMMAD TUFAIL BIN MAHMUD as Managing Director of the Company With immediate effect.

DCR: APPOINTMENT OF CHAIRMAN

FURTHER RESOLVED to approve the appointment of DATO' TING CHECK SII as Chairman of the Company with immediate effect.

Dated this 17 June 2003.

DATO' HAJI MOHAMMAD TUFAIL BIN MAHMUD

DATO' TING CHECK SII

DATO'HAJI IBRAHIM BIN MAHMUD

ANITA HAMIDAH TUFAIL

(iv) the first respondent alleges that after the petitioner voluntarily resigned as managing director, he had a change of mind. Instead of diligently discharging his duties as a director, he then commenced to create problems, refused to participate in or co-operate with management, made baseless allegations and gave excuses not to come to the offices of the second respondent. (*The first respondent supports the allegation with various contemporaneous documents*).

(v) the companies under Sanyan Group are separate, legal autonomous entities comprised of individual and distinct board of directors who have the day-to-day conduct of the business of each respective company. Each of the said company is involved in businesses and activities distinct from each other and is comprised of shareholders different and distinct from each other. Further, each of the said companies are operated pursuant to and in accordance with CA 1965 and with general corporate principles and the respective memorandam and articles of association.

(vi) there has never been any intention, understanding or agreement between any of the shareholders or directors of any of the companies averred therein that any of them were to be operated as a joint venture, as a partnership or as a quasi-partnership.

(vii) the second respondent is a profitable company. The second respondent company employs numerous people who depend on its ongoing business. The management and co-ordination of Wisma Sanyan is intimately linked with the second respondent.

(viii) the petitioner is motivated by his own selfish interests and is prepared to take the drastic step of winding up the second respondent. Instead of the possibility of a share buy-out, the petitioner has decided to take the excessive step of petitioning to wind up the second respondent.

[10] There are a number of authorities from the commonwealth countries and Malaysia to show that court, based on 'just and equitable' ground, has wound up the company where it was found:

A (a) in case of a private company; there were grounds justifying dissolution of a partnership; (b) the company was commercially insolvent; (c) it had assets but they were locked up and not immediately available; (d) its business could only be run at a loss and insolvency was inevitable; (e) all the company's capital was lost and the business had come to an end without any prospect of resuscitation; (f) it was a bubble company; (g) it was a fraudulent company; (h) it carried on illegal business; (i) the company had no bona fide desire to carry B on business; (j) there was justifiable lack of confidence in the conduct and management of the company's affairs; (k) there was preponderating influence of some shareholders whose conduct required investigation but who prevented resolution being passed for winding up of the company; (l) there was no properly constituted Board or the directors were fighting amongst themselves; (m) where substratum had gone or it was impossible to carry on business except at a loss or the liabilities were far in excess of existing and possible assets; C (n) where a scheme became unworkable.

In the following cases, the courts have refused to make a winding up order on 'just and equitable' ground:

(a) where there were allegations of mismanagement or misappropriation of funds by D directors and nothing more; (b) where there were quarrels and groupings among share-holders; (c) where there was general or mere allegation of oppression of minority shareholders; (d) where it was found that the substratum had not wholly gone and the majority of shareholders opposed winding up; (e) where winding up order was sought on the ground that the directors were guilty of misconduct and that the majority of shareholders wanted winding up; (f) where company was running at loss; (g) where petition E was not motivated by desire to do justice to company or to see that justice was done to shareholders but for private reasons.

[11] The word just and equitable has a special meaning in the jurisprudence of company winding up. This principle recognises the fact that a limited company is F more than a mere juridical entity, with a personality in law of its own. Amongst it, there are individuals with rights, expectations and obligations inter se, which are not necessarily recognised in the company structure. Recognition of these facts enables the court to subject the exercise of legal rights to equitable considerations. Considerations, that is of personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights or to G exercise them in a particular way. The leading case on point is the case of *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360, where the company was formed by two shareholders holding equal shares to take over their partnership business. Later on, one of the son's of the shareholders was made a shareholder and director. Thereafter both using the majority voting power removed the other as director of the H company. The House of Lords took the view that where the majority members in breach of an understanding exclude the minority from participating in the management of the company, the minority member may move the court to wind up the company. Lord Wilberforce observed:

I My Lords, in my opinion these authorities represents a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and

> obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most context, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is of a personal character arising between one individual and another which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way.

[12] The word 'just and equitable' appears in s 37(f) of the Partnership Act 1961. *Ebrahimi*'s case is also authority for the proposition that the court may exercise partnership principle in the dissolution of the company, in that they enable the court to subject the exercise of legal rights to equitable consideration with reference to facts and circumstances of each case. In recognition of this principle, the High Court in *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn. Bhd & Ors and other applications* [1994] 3 MLJ 89 held that *Ebrahimi*'s case does not lay down any test in relation to the 'just and equitable' provision; it merely sets out the circumstances under which the equitable considerations can be adopted, where the examples stated therein were only examples of circumstances where the just and equitable provision can apply. In *Tien Ik Enterprise Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769, the Supreme Court affirming the decision of the High Court held that it is not necessary that prior to the application of the *Ebrahimi* principles, the elements, or at least one of the elements mentioned by Lord Wilberforce in that case must be present. Although the English Companies Act and the Australian Companies Act do contain provisions which require the court in an application to wind up the company on the just and equitable ground, to consider alternative remedies, there is no such provision in the Malaysian or the Singaporean Companies Act. Therefore the Malaysian courts are not obliged to consider the availability of alternative remedies before making a winding up order under s 218(1)(i) of the CA 1965. In *Re Good Wealth Trading Pte Ltd*, Yong Pung How CJ observed:

> The petition to wind-up the company was presented on the ground that it would be just and equitable to do so. There is now a practically unlimited range of circumstances within which a winding-up order can justifiably be made on this ground. Judicial interpretation has added steadily to the categories of cases which may be brought under this ground, and it is inevitable that still more categories will be added by the courts in future. Among the most common cases have been those in which a director has been ousted from office, or where a deadlock has developed in the management of the company's affairs, or where directors have lost confidence in working with each other, or where the company's substratum has disappeared. Although, for convenience, it has been possible to separate the cases into different categories, a principle which has become increasingly accepted is that courts will not hesitate to provide relief and wind up a company, as they would a partnership, if it is clear that the parties involved will no longer be able to work together. In the leading case of *Ebrahim v Westbourne Galleries Ltd*, the House Of Lords, applied partnership principles in making a winding-up order. Although this was a case in which a partner was in fact excluded, the judgments envisaged a wide extention of these principles to cover the cases where directors have lost confidence in working with each other.

[13] It must be asserted that for winding-up the company on partnership principle, the petitioner must demonstrate at least a quasi-partnership, [see *Lim Mong Sam @ Lim Ah Tee v Yai Yen Hon @ Chua Yen Yong & Ors* [1995] 4 MSCL 91, 370].

[14] In *Ng Eng Hiam v Ng Kee Wei & Ors* [1965] 31 MLJ 238, the appellant applied that a company of which he is a permanent director be wound up on the ground that a deadlock had resulted as the two permanent directors in whom were vested the management of the business had fallen out, and that it was just and equitable that the company should be wound up. The application was dismissed by Ong J. ([1962] MLJ 285) and an appeal to the Court of Appeal was also dismissed [see [1963] MLJ 73]. On appeal to the Privy Council, the Privy Council held that the question whether a deadlock exists in the management of a company to make it just and equitable to wind up the company is a question predominantly of fact in each case. The jurisdiction of the court will only be exercised if the court is satisfied that complete deadlock exists in the management of a company. In this case the discretion of the court below had been properly exercised and there were no grounds upon which such discretion could properly be interfered with. The relevant part of the judgment reads as follows:

> Their Lordships do not propose to review these authorities in detail. The question whether such a deadlock exists as makes it just and equitable to wind up the company up is a question predominantly of fact in each case. The principle is clear that if the court is satisfied that complete deadlock exists in the management of a company the jurisdiction will be exercised, see Buckley on *Companies* 13th Ed p 456. It may be that the jurisdiction will be more readily exercised where (as is alleged to be the case here) although the business is carried on by means of a private limited company, the case is one not unlike a partnership. In the present case the courts below have held that such a deadlock as would make it just and equitable to wind the company up does not exist. Ong J said: 'I could not, and still cannot believe, that businessman of the caliber and standing of the petitioner (ie, the appellant) and Ng Chin Siu cannot, if they have to, be large-hearted enough to treat a mutual misunderstanding as if there had never been one.
>
> Hill JA said: 'I do not consider that a stage of such continued quarrelling and animosity has yet been reached between the petitioner and the second respondent' (ie, such precludes all reasonable hope of reconciliation and friendly co-operation) 'and there seems to be reasonable hope of reconciliation and co-operation if ordinary good sense is employed': and Barakbah JA concluded: 'this is a family concern and I feel it would not be impossible for them to resolve their differences and carry on with the spirit of co-operation that had existed from 1952 to 1957.
>
> Their Lordships cannot override these views, even if they felt disposed to do so, which they do not. In addition the fact is that between the years 1957 when the trouble began, up to at least the year 1962 when the matter came before the Court of Appeal, the business had been carried on smoothly and successfully. Further, although in this particular case this consideration is not crucial, Ong J and Thomson CJ clearly took the view that the blame for the difficulties which have arisen rested largely with the appellant himself, and both courts considered that in all the circumstances it would be unfair to the shareholders to wind the company up. In the exercise of their discretion both courts therefore decline to make the order.

[15] The court has a wide discretion under s 218(1)(i) of CA 1965 as stated in the above cases to wind up a company on just and equitable ground. Such discretion is not ordinarily exercised for various reasons. Some of them are as follows: **A**

(i) A company is a separate entity. The court acknowledges the fact that upon its formation the management of the companies' affairs and the right of shareholders is subject to memorandum and articles of association of the company. Any proposition or oral agreement by shareholders which is not found in articles of association will not be given legal effect in ordinary circumstances. This is so because it is accepted under company law jurisprudence that the company is expected to be managed and governed according to law and not necessarily by rules of equity by the majority of the shareholders. However, the 'word just and equitable' has a special meaning in the jurisprudence of company winding up. This principle recognises the fact that a limited company is more than a mere juridical entity, with a personality in law of its own. Amongst it, there are individuals with rights, expectations and obligations inter se, which are not necessarily recognised in the company structure. These facts enable the court to subject the exercise of legal rights to equitable considerations. **B** **C** **D**

(ii) The leading case which adumbrated on just and equitable principle in the context of quasi-partnership is that of *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360. In my view, *Ebrahimi*'s case and the principles stated therein must be seen to be rare exceptions for a shareholder at this age and time, who is a literate and familiar with corporate structures will be unlikely to convince the court that he needs the assistance of equity to protect his right when he was by himself indolent in not protecting his right when he had ample opportunity of obtaining legal advice to do so. **E** **F**

(iii) *Ebrahimi*'s case must be understood by its own context, for, the shareholders there were partners before the company was incorporated. They were not investors. There is a distinction between partners and investors. Company structure or corporate structure is meant for investors and people who want to participate in running of business pursuant to Companies Act and enjoy the benefit and the protection given under the limited company concept. One attractive proposition under CA 1965 is that the shareholders or directors cannot be made liable to the debts of the company for more than what they have subscribed. Such protection is not given for partnership business governed by Partnership Act 1961. There is nothing in law from stopping two good friends or more having mutual trust and confidence to operate a partnership business. This ordinarily does not happen when the investment is large. The reasons are obvious. In *Cox v Hickman* [1860] 8 HLC 268, it was stated: **G** **H**

> The law as to partnership is undoubtedly a branch of the law of the principal an agent. The liability of one partner for the acts of his co-partner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his co-partners; all are therefore liable for the ordinary trade contract of the other. **I**

A

> The public have a right to assume that every partner has authority from his co-partners to bind the whole firm in contracts made according to the ordinary usage of trade.

Courts are well aware that a person who incorporates companies to do business does not want to be bound by partnership principles and they seek protection under the spirit and intent of CA 1965. In consequence courts do not ordinarily entertain sympathy evoking stories, unless the justice of the case demands the intervention of the court, taking into consideration the fact and all the circumstance of the case, to ensure transparency and corporate accountability, in the right perspective.

(iv) Before exercising the discretion under just and equitable principle, the court must be satisfied that the petitioner's complaint is bona fide and he comes to the court with clean hands and that there is no collateral purpose in presenting the petition. A minority shareholder who finds that he has been the subject of oppression by the majority can easily invoke s 181 of CA 1965 and seek various remedies in law and that will also include winding up of the company on just and equitable grounds. However, under s 218(1)(i) of CA 1965 the only order the court can make is winding up of the company and in consequence not only the petitioners' interest need to be taken into account, the court must look into the interest of shareholders, employees, creditors, inclusive of Banks and all third parties and ultimately public interest as a whole, [see *Bhalachandra Dharmajee Makaji v Alcock, Ashdown & Co Ltd* [1972] 42 Com Cases 190 (Bom); *State Bank of India v Hedge and Golay Ltd* [1867] 62 Com Cases 239 (Karn);*Walter L Jacob & Co Ltd Re,* 1989 BCLC 345 (CA)]. The court needs to balance the different rights and equities of all parties to be affected by the order, taking into account all the facts and circumstances of the case to see whether there is anything in the management and conduct in the affairs of the company which requires the court to decide that the company ought to be wound up, [see *Nageswara Rao v Rajahmundry Electric Supply Corporation Ltd* 1957 Andh LT 728]. It must be asserted here that the fact that the company is prosperous and makes substantial profits is no obstacle for it to be wound up by the court under the just and equitable principle.

(v) Courts have often said that mere mismanagement or misconduct on the part of the directors, not affecting the financial position of the company, cannot be considered as ground for winding up as there are other suitable remedies in law to address such grievances, [see *Patel Extrusion Processes P Ltd Case; Palmer's Company Precedents*, 17th Ed, Vol. 2, p 36; *Re Cooper (Cuthbert) & Sons Ltd* [1937] 2 All ER 466; *Halsbury's Laws of England* 4th Ed, Vol 7, p 1001].

(vi) A winding up order will not be made when a director has been excluded for management of the company's business, if the director has expressed willingness to sell his shares to the remaining directors and shareholders and they have offered to buy them at their fair market value as assessed by an independent expert, [see *Re A Company* [1983] 2 All ER 854; 1983 BCLC 151 (Ch D)].

(vii) Oppression of minority shareholders will be a 'just and equitable ground' where those who control a company exceed or abuse their power to such an extent as to seriously prejudice the interests of minority shareholders. The court will be justified in interfering in such case, even though the general principle of company law is that the proper forum for settlement of 'indoor affairs' of a company is a general meeting of the company. But the Court will not make an order of winding up unless it is proved that wrong has been done to the company by abuse of majority voting power, and it is impossible for the business of the company to be carried on for the benefit of the company as a whole, owing to the way in which the voting power is held and used, [see *Re Anglo-Continental Produce Co Ltd* [1939] 1 All ER 99].

(viii)The remedy of winding up must be seen to be the last resort. It is not sufficient to show the mere existence of a majority in control of the affairs of the company as a ground at all to wind up a company. It must also be coupled with evidence that the affairs of the company are not conducted within the norms of corporate transparency and accountability, [see *Ripon Press & Sugar Mill Co Ltd v V Gopal Chetty* AIR 1932 PC 1; *Loch v John Blackwood Ltd* [1924] All ER 200 (AC); *Veeramachineni Seethiah; Cuthbert Cooper & Sons Ltd Re* [1937] Ch 392].

(ix) It is accepted principle that 'If a private company could be fairly called a partnership in the guise of a private company then the things which might be a ground for dissolution of a partnership will apply also in the case of the private company', [see *Yenidje Tobacco Co Ltd, In re* [1916] 2 Ch 426 (CA); *Virendra Singh Bhandari v Nandlal Bhandari & Sons Ltd* [1982] 52 Com Cases 36 (MP)]. In *Hind Overseas (P) Ltd v Raghunat Prasad Jhunjhunwalla* AIR 1976 SC 565, the Indian Supreme Court made the following observations:

> Where more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked. Besides, it is only when shareholding is more or less equal and there is a case of complete deadlock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding up on the just and equitable ground. In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership.

(x) In my view, a winding up of company on quasi partnership principle can only be readily applied in cases relating to domestic companies. Quasi partnership principle may become totally irrelevant when the company which is the subject matter of the petition has other related companies who are subsidiary or alike having different shareholders and directors, [see *Atul Drug House Ltd, In re* [1971] 41 Com Cases 352; [1970] 2 Comp LJ 274 (Guj); *Abnash Kaur v Lord Krishna Sugar Mills Ltd* [1974] 44 Com Cases 390 (Del); A *Company Re,* (No. 0370 of 1987) [1988] 1 WLR 1068].

(xi) In my view the *Ebrahimi*'s case is a mere guideline and was decided in the year 1973 when knowledge of the workings of the principle of doctrine of separate entity was a new concept introduced to the common law jurisprudence. Over the years there has been much awareness as to the concept of separate legal entity and readily available advice of legal practitioners before the incorporation of the company takes place. A petitioner today cannot simply rely on *Ebrahimi*'s principle when he could have prudently documented his right in the Articles of Association, or by shareholders agreement, not contrary to law.

[16] I have read the petition, the affidavits and the submission filed herein in detail. I take the view that the petition ought not to be allowed for the following reasons:

(a) The petitioner was only a foreman in the company where the first respondent was at that material time a director. The first respondent must have had respect for the petitioner's business ability but did not have intention at all to make him an equal partner. This can be seen in the different equity structure of the petitioner and the first respondent in the Sanyan Group. It is clear from the conduct of parties that the first respondent always wanted to have control over the company. If at all the petitioner was made a managing director, it must be the case that the first respondent must have had great respect in the petitioner's ability to manage the company. This does not necessarily mean that it must be equated to mutual trust and or confidence. It can also be attributed towards commercial productivity. Till date the first respondent had not removed the petitioner as the director or chairman, notwithstanding the fact that there appears to be evidence of misunderstanding from the time the first respondent's daughter started participating in the business activities.

(b) The Sanyan Group does not come within the definition of domestic company as all the companies the second respondent is associated with has different shareholders with different equities and consisting of foreign shareholders. The formation of the second respondent cannot be equated to the facts of *Ebrahimi*'s case. Ebrahimi was a trading company and the shareholders before its inception were partners, who were involved directly with the trading of the said company. The second respondent in my view does not need such personal touch. Such a corporation needs only good CEO and goodwill of directors to secure good concessions from contracts or business to operate profitably. Thus, the presence of the petitioner or the first respondent as director or chairman cannot be said to be the sine qua non for the second respondent to operate though it may be the criteria for its profitability. In this case, there is no allegation the second respondent is not running profitably. The petitioner and the first respondent can still afford not to participate in the management of the company and still be shareholders and contribute to obtain good contracts or concessions and still receive dividends. I do not see why the company should be wound up on the facts of this case where the petitioner has not been deprived of his directorship and the company is still operating profitably.

(c) It is my finding that the petitioner had voluntarily resigned as the managing director as evidence by documentary evidence. The first respondent in this case

can be said to have shown magnanimity to have allowed the petitioner to be the managing director when the petitioner was only a minority shareholder and allow the petitioner to be the chairman till date when the first respondent only holds the position of the managing director. In my view there is no specific evidence to hold that there is a quasi partnership. On the facts I see it as purely a business venture on which both parties must have relied on their respective goodwill to garner profits rather than mutual trust and confidence in the literal sense, related to partnership. Good relationship and respect for one's ability to manage is quiet different from mutual trust and confidence needed for a quasi partnership, which must be shown to exist from the date of inception. Thus, those who enter into partnership do not mean that they do so because of mutual trust and confidence among each partner. All prudent partnerships are entered into after taking into consideration the calculated risk and not because of mutual trust and confidence. Once a partnership comes into effect, the law requires some category of honesty and fiduciary responsibility to be maintained for the common good of the business and this cannot be equated to mutual trust and confidence.

(d) The second respondent is only an investment company. Extension of its investment to various other companies with different shareholders and different share structure to my mind destroys the exclusivity element of mutual trust and confidence, as envisaged in the case of Ebrahimi. If it was meant to be quasi partnership between the petitioner and the first respondent, it is unlikely that the petitioner will have allowed third parties to join their corporate structure indirectly.

(e) By no stretch of imagination will I call it a quasi partnership. It was purely a business venture and is reflected by the conduct of parties by venturing with various other parties to make a profit and not exclusively to keep all ventures among the petitioner and the first respondent alone.

(f) When friends or acquaintance together form a company and there is no right as such agreed upon for active participation of members among themselves, the principles of dissolution of partnership cannot be liberally invoked. Besides, it is only when shareholding is more or less equal and there is a case of complete deadlock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding up on the just and equitable ground.

(g) The doctrine of legitimate expectation which the petitioner attempts to invoke is not a cure for all maladies. It will not apply to cases where the complainant has not been vigilant in protecting his rights, when he had all the opportunity of doing so. The petitioner's complaint that he has been excluded from the management does not carry weight as one should not expect to be participating as managing director until ones natural life.

(h) It is my finding that from the evidence as a whole, the conduct of the first respondent has been exceptionally reasonable and courteous and he has not made any personal allegation against the petitioner compared to the facts of other reported cases in this area of law. Further, the first respondent voluntarily

allowed the petitioner who is a minority shareholder to be the chairman of the second respondent. This speaks volumes about the magnanimity of the first respondent and his gratitude to the petitioner for helping him to make the second respondent a success story to add to the national pride and Pelita as an additional symbol which stands like a beacon to the State of Sarawak.

[17] En passant, I will say it is in the interest of both the petitioner and the first respondent to reconcile the differences and continue to work together to the best interest of the second respondent and all those who are dependent on its success. I am mindful of the fact of the proposed settlement, and trust the solicitors herein will do the needful for the successful venture to continue in the nation's interest. In this instance, both the solicitors have presented their case well and I take this opportunity to thank them.

[18] For reasons stated above, I dismiss the petition with costs to the respondents. Many documents have been involved in this case and much time would have been spent by the respective solicitors. For that reason, I take the view the getting up fees in this case should not exceed RM100,000. In the event that the getting up fees cannot be agreed, the respondents are at liberty to tax their costs. I hereby order so.

Petition dismissed with costs.

Reported by Sally Kee